

U.S. Department of Labor

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DATE ISSUED: July 10, 2000

Case No.: 2000-CAA-00006

In the Matter of

IRA H. KEMP

Complainant

v.

**VOLUNTEERS OF AMERICA of
PENNSYLVANIA, INC.**

Respondent

RECOMMENDED DECISION AND ORDER GRANTING BENEFITS

Procedural History

This proceeding arises under the employee protection provision of the Clean Air Act, 42 U.S.C. Section 7622 (1982) which prohibits an employer from discriminating against an employee because the employee has engaged in a protected activity.

The Complainant, Ira H. Kemp, filed a complaint, dated July 26, 1999, with the U.S. Department of Labor that he was discriminated against because he filed a complaint under Section 322(a)(1-3) of the Clean Air Act. In his complaint, Mr. Kemp alleged that he was exposed to asbestos in the thrift store of the Volunteers of America (hereinafter "VOA") at 1404-1406 North Third Street in Harrisburg, Pennsylvania. That the Respondents were on notice of the exposed asbestos and refused to correct the torn asbestos pipe covering in the basement. Mr. Kemp's most recent complaints took place in 1998 and 1999. Further Mr. Kemp alleges that he was employed by the Respondents at the aforementioned address for years, working five days a week, 7½ hours a day. The basement area was always open and frequently used. Mr. Kemp alleged that there was asbestos on the floor and he stopped allowing sweeping of the floor or dusting because of the presence of the

asbestos. He further alleged that he was terminated from his position because of his complaints relative to the asbestos.

The U.S. Department of Labor, Occupational Safety and Health Administration (hereinafter "OSHA") investigated the complaint and reported to Mr. Kemp on January 10, 2000. They indicated that they unsuccessfully attempted to resolve the situation in a mutually agreeable settlement. Thereafter they conducted an investigation. They stated:

The investigation did not verify that discrimination was a factor in the actions compromising your complaint.

Mr. Kemp then appealed the denial and requested a hearing by letter dated January 20, 2000. A formal hearing was held on March 29, 2000 in Reading, Pennsylvania. Mr. Kemp was advised of his right to be represented by counsel and decided to appear pro se.

Applicable Law

The protective employee provisions of the Clean Air Act in pertinent part provides:

No employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee...

1) commenced, cause to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter.

2) testified or is about to testify in any such proceeding, or

3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

The Secretary of Labor has articulated the legal framework under which parties litigate in retaliation cases. Under the burden of persuasion production in whistleblower proceeding the Complainant must first present a **prima facie** case of retaliation by showing:

1) that the Respondent is governed by the Act;

2) that Complainant engaged in protected activity as defined by the act;

3) that the Respondent was aware of that activity and took some adverse action against Complainant, and

4) that an inference is raised that the protected activity of Complainant was the likely reason for the adverse action.

See Hoffman v. Bossert, Case No. 94 CAA-4 (Sec'y 09/19/95); Bechtel Construction Company v. Secretary of Labor 50 F. 3d 926(11th Cir. 1995).

ISSUES

1. The applicability of the Clean Air Act,
2. Whether Mr. Kemp engaged in activities protected under the Clean Air Act,
3. Whether Respondent discriminated against Mr. Kemp in retaliation for his alleged protected activities.

SUMMARY OF THE EVIDENCE¹

Testimony of Ira. H. Kemp

Mr. Kemp testified that he had asbestos exposure, his son was also exposed to asbestos while visiting him in the store. He also claimed that his discharge was unjustified. TX 08. Mr. Kemp stated that he had gone through a colonoscopy prior to realizing what was going on. He testified that this colonoscopy was preceded by a bleeding nose and blood everywhere else. TX 08. He also testified that there were two secretaries in his work place that died from brain tumors and they were exposed to the same environment. TX 09. Mr. Kemp testified that at this stage, even a doctor's diagnosis would not satisfy him as to the long range effects from this. He declined to be examined by a medical expert in asbestos exposure. TX 10-11. He said that at this stage he does not have an asbestos condition but even a diagnosis today would not be assured of the results tomorrow. He said that his son is nine years old will be ten the next week. TX 16. He said that his discharge by Respondent was abrupt, he had been with the Volunteers of America for 15 years plus, and he constantly complained of asbestos exposure. TX 18. He stated that he wanted financial damages and medical treatment as long as he was alive. He said that

¹The following references will be used herein. "CX" designates Complainants Exhibits; "EX" designates Respondents Exhibits, and "TX" designates the page of the hearing transcript of March 29, 2000.

he could not specify at this stage all the damages that he suffered. TX 20. Mr. Kemp testified that he had a law degree. TX 27. He said that he disagreed with Mr. Sekwan's, the investigator, conclusion that his position was eliminated due to restructuring and reorganization. He said that the Respondent had used restructuring and reorganization as a veil to conceal many ills. He testified that he had been employed by the Respondent for approximately 15 years. TX 29. He started out as a volunteer, then he did minor carpentry, cleaning at the warehouse which was in another location, also assisting with some of the guys in the mental health program. His work address was 1404-1406 North Third Street in Harrisburg, Pennsylvania. He may have received one promotion and his wage was slightly above minimum wage. He thinks it was \$6.00 per hour. TX 31. He ran the thrift store at 1404-1406 North Third Street. He said that the first time he noticed there was asbestos in the building was when a sprinkler system was being installed in the basement. He moved a lot of stuff and saw rips and tears in the piping or covering over the pipes, and there was a lot of dust from the tears. TX 32. If you walked in the area you could barely breathe. At that point he notified the then CEO, Steve Jones, that he thought the dust was asbestos. Mr. Jones called a removal contractor who advised him that it was in fact asbestos. Mr. Jones sent him a statement that they were going to have the store cleaned and tidied up. He assumed that it was going to include removal of the asbestos. TX 33. At that point Complainant's Exhibit No. 1 was received into evidence. He stated that volunteers came in and cleaned the place. The person who said it was asbestos was there prior to the issuance of the letter. TX 36. He said that he could not remember the date when he found the asbestos. He did think that they were going to clean it up, and he regarded this as an informal complaint. TX 38. He received a letter on June 21, 1999, hand-delivered, relative to a reorganization. He did not think that it was going to affect him because his check was subject to garnishment to support his 9-year old son. He was terminated. The termination was so abrupt that he had to conclude that it was an attempt to avenge a wrong for something he had done. He complained periodically to Alan Garner and Robert Grubb that there was asbestos in the basement of the thrift store. TX 40. They lead him to believe that they were going to correct to asbestos situation. He obtained OSHA records regarding their examination which he furnished to counsel. TX 41-42. Mr. Kemp was asked to prove that he was discharged because of his complaints of asbestos exposure. He testified that he had been employed there for about 15 years and he had informed his employer that he was going to leave the next day to attend to family business in Georgia. He went to Georgia about one time per month and he always notified them two weeks ahead. He testified that Mr. Grubb came into the store on June 22, and handed him a letter terminating him. He said the letter was vengeful sounding to him. He was told to leave his keys with the person taking over. TX 45, 46. He said that he was given a portfolio indicating a date in 1990 that retirement funds would be extended back to. He was told because of their merger, and the incorporation, he would not qualify for the 401K. He testified that this was another attempt to penalize him for his complaints about the asbestos. He refused to allow the cleaning people to sweep the floor because this would cause hazardous dust. TX 46. Immediately after returning from Georgia he filed his complaint in the local OSHA Office under the Clean Air Act. TX 48. He had a report relative

to a colonoscopy from the Veterans Administration and he said that he would get records relative to his son's exposure and the allergies that he suffered. TX 49-53. He testified that he was making less than \$10,000.00 per year after 15 years of service. TX 54. After he complained about the asbestos another man was promoted and put on the truck, and he remained in the thrift store. TX 55. His medical problems include bloody nose and allergies. He had received medicine but he had a reaction to it and he discontinued the medicine. He is now allergic to dust, animal hair, cats and stuff like that. He also gets skin irritations. TX 55. His son has skin irritations and breathing problems and a raspy voice and he takes treatments for his allergies. He is currently employed as a night auditor for the Marriott Hotel Chain and as a Community Support Associate for Keystone Services which operates a residential service for mentally impaired people. He gets \$8.75 from the residence and from Marriott \$7.75 per hour. TX 56.

Cross-examination

Mr. Kemp testified that he had no medical evidence stating that he had asbestos. He had never made it known to a doctor that he was exposed to asbestos. He had no medical evidence that the allergies that he indicated that he had are caused by asbestos. TX 58. He said that he signed the asbestos complaint before a Notary, and he stated that he complained about the asbestos in a staff meeting which was presided over by Alan Garner, President and CEO, and by Robert Grubb, Interim Regional Director. He said that both gentlemen were present in court. TX 60. He said that he mentioned the condition in the basement and complained to Mr. Garner and Mr. Grubb when they came into the store and he asked him what he was going to do about the asbestos in the basement. He precisely used the word asbestos. He said that there were two or three staff meetings with Mr. Garner. He was asked if it was true that he only sat in on one staff meeting when Mr. Garner and Mr. Grubb both present. TX 62. He replied he could not say for sure because there were other people present and he was not sure who was present. He assumed that they were both there. Mr. Kemp testified that the asbestos was in the basement. TX 62. He was on the first floor the majority of the day. TX 63. He said that the asbestos he observed was exposed due to rips in the pipe covering. He stated that the air quality of the store was in the records that the engineers gave to Mr. Morrison, that he made a part of the record. TX 64-65. His position at the VOA was clerk, and his son was in the store on Saturday for three to five hours when he had custody and he played with other children. He played throughout the store. TX 65-66. Occasionally he went in the basement, until he found out about the asbestos, which was when the sprinkler system was installed. TX 66. He said that there was no grievance procedure. TX 67. He then said that he was aware that he could address a grievance or some issue with a supervisor and that he signed a receipt for an employee manual. He went to his supervisor on issues other than asbestos. TX 68. Mr. Grubb was his supervisor for a period of time, and he complained to him relative to the asbestos. He did this when they were talking about removing the carpet and redoing the store. He mentioned that there was asbestos in the basement. He went to the basement and did not go again. TX 69. He did not file a complaint with OSHA while he

was employed, and filed after his position was eliminated. He testified that he did not submit a complaint about asbestos in writing because he would be jeopardizing his employment there. TX 70. Mr. Kemp stated that he wrote (Exhibit No. 3) a two page letter to Mr. Tom Stires complaining about his exclusion from the VOA, 401K. TX 71. He also copied Steve Jones, Regional Director of VOA. TX 72. He received a letter from Tom Stires, CEO, VOA. He said that the letter indicated that the 401K became effective in 1990 and he was notified of it in 1998. He also called the Principle Group, the managers of the 401K. TX 73,74. He testified that he did not complain in writing about the asbestos. He also testified that when he was told that his position was being eliminated, he asked Mr. Grubb if it was because he complained about the 401K. He said that it was obvious he complained about the asbestos, and he could see the vengeful nature what was going on when he got the termination letter with the 401K thing. TX 74. He said that he had made no complaints about asbestos in writing. TX 75. Mr. Kemp stated that he would still be in court if he was not terminated, since he would have proceeded on the asbestos contamination and exposure. He also said that the timing of the notice of termination, the physical environment that was prevalent, his actions and his word were evidence for believing that he had been retaliated against, you're out of here you're history. TX 76. He agreed that VOA was restructuring and reorganizing, however he strongly contended that the incorporating and a merger was a corporate veil to cover up wrongs and ills that had been committed toward him and others. Two secretaries died with brain tumors working in the asbestos environment. TX 77. He said that Steve Jones was a CEO of VOA, and was not named in his complaint because he was no longer there. He said that he was not privy to the management changes at VOA, and that he did not have to go through the abruptness and the harshness and the injury that he suffered as a result of the abrupt termination. TX 79 Mr. Kemp then offered into evidence a procedural manual he received from VOA. It was marked for identification. TX 81.

Testimony of Alan Ray Garner

Mr. Garner testified ,TX 82, that he was the President and CEO of Volunteers of America Pennsylvania, Inc. He was responsible for the merger of three former Pennsylvania Volunteers of America Corporations. The charter of Volunteers of America Pennsylvania includes the State of Pennsylvania except for the five county metro Philadelphia area. He came to volunteers of American of Northeastern Pennsylvania in Wilkes-Barre, May 1, 1995, to discuss a merger of VOA Harrisburg and VOA Leigh Valley and Allentown. TX 85. It was agreed that Steve Jones would become the Regional Director of VOA Central Pennsylvania region. TX 86. In mid-January Mr. Jones was replaced by Mr. Robert Grubb on an interim basis, and then he was replaced in mid-June by Ms. Jacquelyn Morrison. With respect to the Thrift Store in which Mr. Kemp worked, his position was eliminated as part of ths restructuring and reorganization. TX 87. It was determined that a person would be brought in to manage the thrift store. The supervision would be within the thrift store instead of under the Regional Director. Mr. Jones and Mr. Grubb decided that Mr. Kemp's position was going to be eliminated. He said that Mr.

Kemp's position was not refilled by anybody. TX 88. He testified that Mr. Kemp never complained to him about asbestos. He said that Mr. Grubb never told him that Mr. Kemp complained about asbestos. Mr. Jones did not tell him that Mr. Kemp or anyone had complained about asbestos. TX 89. The fact that his position was eliminated did not have to do with any complaint of asbestos because he was not aware of any complaints of asbestos. There was one staff meeting in which he was present with Mr. Kemp on Friday, September 4, 1998. It was at 2112 Walnut Street and it was about the thrift store. He prepared a document relative to the meeting and there was no reference to a complaint of asbestos by Mr. Kemp or anyone else during the staff meeting. If a complaint of asbestos was made he would have made note of it in the document. TX 91. There was no contest of Mr. Kemp's application for unemployment benefits, and the termination was not meant to harm him. He stated that the manual introduced by Mr. Kemp was marked VOA Northwest Washington, Everett Washington. It's their thrift store manual, and the thrift store manuals are potentially different at different stores. VOA was first contacted by OSHA regarding asbestos after Mr. Kemp lost his job. The day Mr. Grubb got the phone call they went to the thrift store and found what they assumed to be asbestos on the city steam pipes which came from the city utilities. TX 93. An expert was consulted and eventually the asbestos insulation on the pipes was removed. This took place during the reorganization. In the particular thrift store Mr. Kemp's supervisors positions were also eliminated. TX 94. He could not locate any written objections from Mr. Kemp about asbestos. TX 95. The removal of the asbestos took place after Mr. Kemp left, and that prior to the OSHA complaint they were not aware that there was an asbestos issue. The layoff of Mr. Kemp did not have anything to do with asbestos. TX 95.

Cross examination of Mr. Garner

He was given Exhibit 04, the meeting notes, which is his transcription of what they discussed in the board meeting in the basement, it is an e-mail form. TX 97. Mr. Garner was asked if he was ever present with Mr. Kemp in the thrift store. He said that he was and there was no transcripts taken of the time they were present together. Mr. Garner stated that he had never called employees together at the thrift store. He was asked if asbestos was mentioned at the meeting and if it was transcribed. He said there were no transcriptions of such a meeting. TX 98. He said that the group statements and everything that was discussed was reported. He did not recall any informal meetings where he and other employees were present. TX 99-100. Mr. Garner then asked him to define informal. Mr. Kemp said in the store with other staff members regarding conditions of the store, clean-ups, the removal of the carpeting, installation of the new floor. Mr. Garner testified that he did not recall any meetings like that. Mr. Garner stated that it was his understanding that Mr. Kemp was asked by someone at OSHA if he was willing to settle and I was told no he said no. TX 100-101. He was asked if he recalled giving Mr. Kemp a copy of the procedural manual. He said that he gave one to Steve and asked him to pass it on to other staff members. TX 102. Mr. Garner stated that Mr. Kemp's position was called part-time store clerk and that position probably exists today. He said that they have

volunteers and a paid supervisor. The position was changed to supervisory position as part of the reorganization. He was asked what was the need for the sudden termination. He said that technically he did not do that. That although his name was on the letterhead, the interim regional director had the authority to write letters terminating staff and he did not necessarily see them. The letter was actually signed by Mr. Robert Grubb. TX 105. He said that he was aware that Mr. Grubb was going to terminate him. He said the termination had to be made. Mr. Garner did not explain the sudden termination of Mr. Kemp. His stated that he had terminated another employee before and had given notice of termination. TX 107. He said that if federal or state funding was to run out, they would notify the staff the date the funding would stop. If it was a change in positions, part of a reorganization we may do it effective immediately, of course if it was for cause then it could be done immediately. He admitted that Mr. Kemp's termination was not for cause, and he maintained it was a part of reorganization. He admitted that Mr. Steve Jones was given severance pay when he was terminated. TX 108-109. He also testified that Mr. Kemp's request to be included in the VOA, 401K pension plan did not enter into his decision to eliminate his position. He said that the termination "It was nothing—had no bearing on you personally." He said that the employees of Central Pennsylvania became eligible for the 401K on January 1, 1998 and it did not exist before that for Central Pennsylvania. TX 109. He maintained that the questioning relative to the 401K did not create any ill will on Tom Stires or his part. He said that no other person in the store was terminated, and there were no truck drivers terminated, although two resigned. Mr. Garner stated that the highest paid position in the store was the supervisor. TX 111. He again maintained that he never was told about asbestos by Mr. Kemp. TX 112

Testimony of Robert P. Grubb

Mr. Grubb testified that he was presently an attorney in private practice. He previously worked for VOA as Interim Director and was in charge of the Thrift Store from January 1999 to the end of June or the beginning of July 1999. TX 114. There was a reorganization in VOA, as a consequence Steve Jones lost his job, and he became the Interim Director, and was Mr. Kemp's supervisor. He stated that Mr. Kemp did not complain to him about asbestos. He would have remembered if he had. He was the person that was given the task of notifying Mr. Kemp that his position was being eliminated. TX 116. Mr. Kemp was stunned when he told him and he walked away from him. He asked him if this was in retaliation for him complaining about the 401K and he told him it had nothing to do with that. He did not ask if it was in retaliation to his complaints about asbestos, and Mr Grubb was not aware he had complained about asbestos, to anyone. TX 117. He testified that the elimination of Mr. Kemp's position was largely on his recommendation. He said that on Tuesday, Mr. Kemp's day off, the store ran much more efficiently than when he was in the store. While he was Interim Director it became clear that we needed an on-site manager, and not a remote manger. Until that time the Regional Director was responsible as the manager of the store, and technically was the store manager. He felt that an on-site manager was needed. A new position was created. The store needed to be run more

efficiently on the whole and the management of the store needed to be located in the store. TX 118. Mr. Kemp was one of several store clerks, and he had the vast majority of the time at the store. He was part-time but he worked 35-37 hours at the store. Mr. Grubb lost his position a week or two after Mr. Kemp's position was eliminated.

Cross -examination

Mr. Grubb again denied that Mr. Kemp complained about asbestos to him . TX 120. He denied that he ever heard about asbestos in any form or manor from Mr. Kemp. He was asked if they discussed the basement, and he said that he was always asking when Mr. Kemp was going to clean it up because it was cluttered. He said that Mr. Kemp never raised the issue of asbestos to him. He said that he was generally familiar with the dangers of asbestos. TX 120. He testified that his first knowledge of asbestos was the OSHA correspondence. He was given his letter responding to OSHA in which he wrote that VOA would take care of it. He again said that it was his recollection that he never heard about asbestos from Mr. Kemp or anybody else. TX 122

Mr. Kemp's rebuttal

Mr. Kemp stated that in his opinion he produced enough evidence that he complained about the asbestos. He also testified that he would someday produce evidence to establish that Mr. Grubb and Mr. Garner were aware that he complained about asbestos, despite the statements that they made today. He was given 40 days to produce proof that he had informed Mr. Grubb, Mr. Garner or other management about the asbestos. TX 123

ISSUE 1. THE APPLICABILITY OF THE CLEAN AIR ACT

The testimony of Mr. Kemp, Mr. Garner, and Mr. Grubb establish that the utility pipes in the basement of Respondent's Thrift Store were covered by asbestos. I credit Mr. Kemp's testimony that the pipes were ripped and the asbestos was present in the form of dust and was in the air. The testimony also established that a complaint was filed with OSHA and the Respondents properly hired an expert to attend to the asbestos. VOA was first contacted by OSHA regarding asbestos after Mr. Kemp lost his job. The day Mr. Grubb got the phone call they went to the thrift store and found what they assumed to be asbestos on the city steam pipes, that came from the city utilities. TX 93. An expert was consulted and eventually the asbestos insulation on the pipes was removed. This took place during the reorganization. In the particular thrift store the removal of the asbestos took place after Mr. Kemp left and that prior to the OSHA complaint they were not aware that there was an asbestos issue. Clearly the fact that the asbestos condition existed and that employees of VOA who were in the basement were exposed to asbestos is sufficient for the Respondent VOA to be governed by the **Clean Air Act , and I so find:**

ISSUE 2. WHETHER MR. KEMP ENGAGED IN ACTIVITIES PROTECTED UNDER THE CLEAN AIR ACT.

I have considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the parties' contentions. See *Frady v. Tennessee Valley Authority* 92 ERA 19 (Sec 10/13/95).

Credibility of witnesses is that quality in a witness which rendered his/her evidence worthy of belief. *Indiana Metal Products v. NLRB* 442 F.2d 46 (5th Cir. 1971) It is well settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. *Altomose Construction Company v. NLRB* 514 F.2d 8 (3d Cir. 1975)

In the instant case, Mr. Kemp contends that he engaged in protected activity under the employee protection provisions of the Clean Air Act when he advised Mr. Garner and Mr. Grubb about the asbestos coming from the utility pipes asbestos covering.

He stated that he mentioned the condition in the basement. He said that Mr. Grubb came around to the store one day and he asked him what he was going to do about the asbestos in the basement. TX 61. He said that he was positive that he used the word asbestos. TX 61,63. He also testified that the asbestos was directly in the basement and was also accessible to anyone that came in. The public would occasionally go there and the staff would always go down to the basement.

ISSUE 3. WHETHER RESPONDENT DISCRIMINATED AGAINST MR. KEMP IN RETALIATION FOR HIS ALLEGED PROTECTED ACTIVITIES.

In the instant case, the Respondent claims that they discharged Mr. Kemp due to a reorganization. Mr. Kemp was one of several store clerks and he had the vast majority of the time at the store. He was part-time but he worked 35-37 hours at the store. VOA admitted that this termination was not for cause. TX 108. No one else in the thrift store was terminated.

In their brief, Respondent's counsel states that it is undisputed that Mr. Kemp did not complain verbally or in writing to any administrative agency until after his position was eliminated. Thus the only basis for any claim of retaliatory discharge would necessarily have to be based upon any internal complaints made by Mr. Kemp while he was employed by VOA. The counsel's position is clearly in error. A whole body of case law has developed relative to oral internal complaints. See *Passaic Valley Sewerage Comm'rs v. United*

States Department of Labor 992 F.2d 474 (3d Cir. 1993). Internal oral complaints to a supervisor are protected activity under the Clean Water Act.

Mr. Kemp, in his brief, states it should not require a special procedure when an employee alerts his employer to asbestos in their store. In Respondent's brief it was alleged that Alan Garner, President of VOA and Robert Grubb testified that Mr. Kemp never complained to them, nor were they aware of any complaints about asbestos at any time, and that if anyone had complained about asbestos, it would have been a significant enough event that they would have recalled such a complaint. Mr. Garner testified that Mr. Kemp was the primary person this position was changed to supervisory position. TX 108. He admitted that this termination was not for cause. TX 108. No one else in the thrift store was terminated. TX 110. Mr. Grubb testified that there were several clerks in the store. Mr. Kemp worked the lion's share of the time almost 35-37 hours a week. He was part-time but he was there most of the time. Mr. Grubb testified that "we talked the store generally. We talked about the basement generally. Most of the time it was - as my recollection is I was asking you when you were going to be cleaning up the basement." Mr Kemp then asked, "you asked me when I was going to be cleaning out the basement." Mr. Grubb responded, "that is correct." Mr. Kemp then asked "and I didn't raise asbestos to you after that?" Mr. Grubb's answer was, "I don't ever recall any issue of asbestos." TX 120.

In their brief, Respondent states that Mr. Kemp was not bashful about raising complaints on issues that concerned him. For example, it was undisputed that Mr. Kemp contacted the administrator of the VOA, 401K in an effort to be included in this plan. The testimony **supra** could lead a logical person to conclude that Mr. Kemp was terminated, in part, because VOA did not wish to include him in the 401K plan. This inference does impact the creditability of the officers of VOA. The testimony of Mr. Grubb relative Mr. Kemp's cleaning up the basement logically leads to the conclusion that the asbestos in the basement was discussed and was a reason for the basement to be cleaned.

The language of the Clean Air Act is capable of different interpretations. Congress did not define terms such as "commence", "participate", "proceeding" or "any other action" as they are used in the Clean Air Act provision. Nor did Congress define what range of conduct is encompassed by the statute's protection of employees who are "About to commence or cause to be commenced, "who are "about to testify", "or who are about to assist or participate in any manner" in a proceeding under the Act. The use of such far ranging language, on textual analysis alone, reveals an intent to afford broad rather than narrow protection to employees. See *NLRB V. SCRIVENER*, 405 U.S. 117.

The Secretary of Labor has held that any employee is protected citing 42 U.S. Sections 5851 (a), 7622(a).

In the instant case, I credit Mr. Kemp's allegations he was concerned about the asbestos falling from the ripped insulation pipes in the basement portion of the store, and that he spoke to Mr. Garner and Mr. Grubb relative to the asbestos. Conversations relative to the asbestos were sufficient to invoke the provisions of the Clean Air Act. Certainly Mr. Grubb's testimony that he discussed the basement clean up **supra** would support Mr. Kemp's allegation that he discussed asbestos in the basement. This discussion was a protected activity under the Clean Air Act, and a formal complaint was made after termination.

In St. Mary's Honor Center 509 U.S. 509 The Court held that:

The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accomplished by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination . Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

In Reeves v. Sanderson Plumbing Products Inc. No. 99-536 (2000 WL 74363 B (U.S.). The Supreme Court of the United States stated:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination and it may be quite persuasive... In appropriate circumstance the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'

I find that Respondent's reason for termination was pretextual. I find that Mr. Kemp was terminated because he sought inclusion in the VOA, 401K plan and he expressed concern and sought to have the leaking asbestos removed from the basement. The asbestos condition was not corrected until Mr. Kemp filed his formal complaint with OSHA. The testimony was that he worked the most hours. He was obviously a good dependable employee. He worked at the thrift store for several years. I do not credit Mr Grubb's testimony that on Tuesday, Mr. Kemp's day off, the store ran much more efficiently than when he was in the store. Mr Grubb testified that he was the remote manager of the store. I do not credit his reason for creating a new position. No other store clerk was terminated. Mr. Kemp was terminated without any warning and for no other cause other than a

“reorganization” and “to have a supervisor on premises.” I find this alleged reason to be pretextual. It was obvious that there were dual motives for terminating Mr. Kemp. One was to prevent him from becoming a participant in the 401K plan and the other was because he was discussing the asbestos in the basement, and the VOA was not prepared for the expense to have the asbestos removed, and did not do so until a formal complaint was filed.

Based upon the totality of circumstances as presented by the evidence of record, and the demeanor and credibility of the witnesses who testified, I can reach no other view than that the termination of Mr. Kemp was motivated by the fact that he complained about the asbestos in the basement and sought inclusion in the VOA, 401 K plan.

In his brief, Mr. Kemp asks for adequate relief in the form of a medical examination for himself and his son, Michael, who spent time playing in the basement area, and continuing medical monitoring for the rest of their lives. He also asked for damages.

Relative to damages, I have considered *Doyle v. Hydro Nuclear Services ARB 99-042*. Mr. Kemp was working different hours and he received and he testified that he was making approximately \$10,000.00 per year. After he was terminated, he received Unemployment Insurance Benefits. He subsequently was hired in two jobs that pay more than he was making in VOA. He declined to specify damages, the time he was out of work. Therefore I must consider compensation for him. I have decided that the sum of \$1,000.00 for compensatory damages is sufficient.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that the following **ORDER** be issued::

1. Respondent shall immediately reinstate complainant to his former position as store clerk at the same rate of pay with his seniority rights reinstated.
2. Respondent shall expunge Complainant's personal file of all memoranda, and references to the adverse employment actions.
3. Complainant is entitled to appropriate back pay through the day he accepted another job. Such pay shall be determined by his average weekly wage together with interest until the day of actual payment.
4. Respondent shall pay Complainant one thousand (\$1,000.00) in compensatory damages, no interest is included.
5. Respondent shall post on all bulletin boards where Respondent's official documents are posted a copy of the Administrative Review Board's Final

Decision for a period of sixty (60) days ensuring that it is not altered, defaced or covered by any other material.

6. Complainant shall have a period of thirty (30) days from the date of this Recommended Decision and Order within which to file with this office an application for costs, only, associated with bringing this action, and Respondent shall have twenty (20) days thereafter within which to file any objections.

PAUL H. TEITLER
Administrative Law Judge

Date Issued: July 10, 2000
Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. Section 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue N.W., Washington, D. C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and the Chief Administrative Law Judge, See 29 C.F.R. Sections 24.8, 24.9 amended by 63 Fed. Register 6614 (1998).